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No. 89-1853

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANK W. SNEPP, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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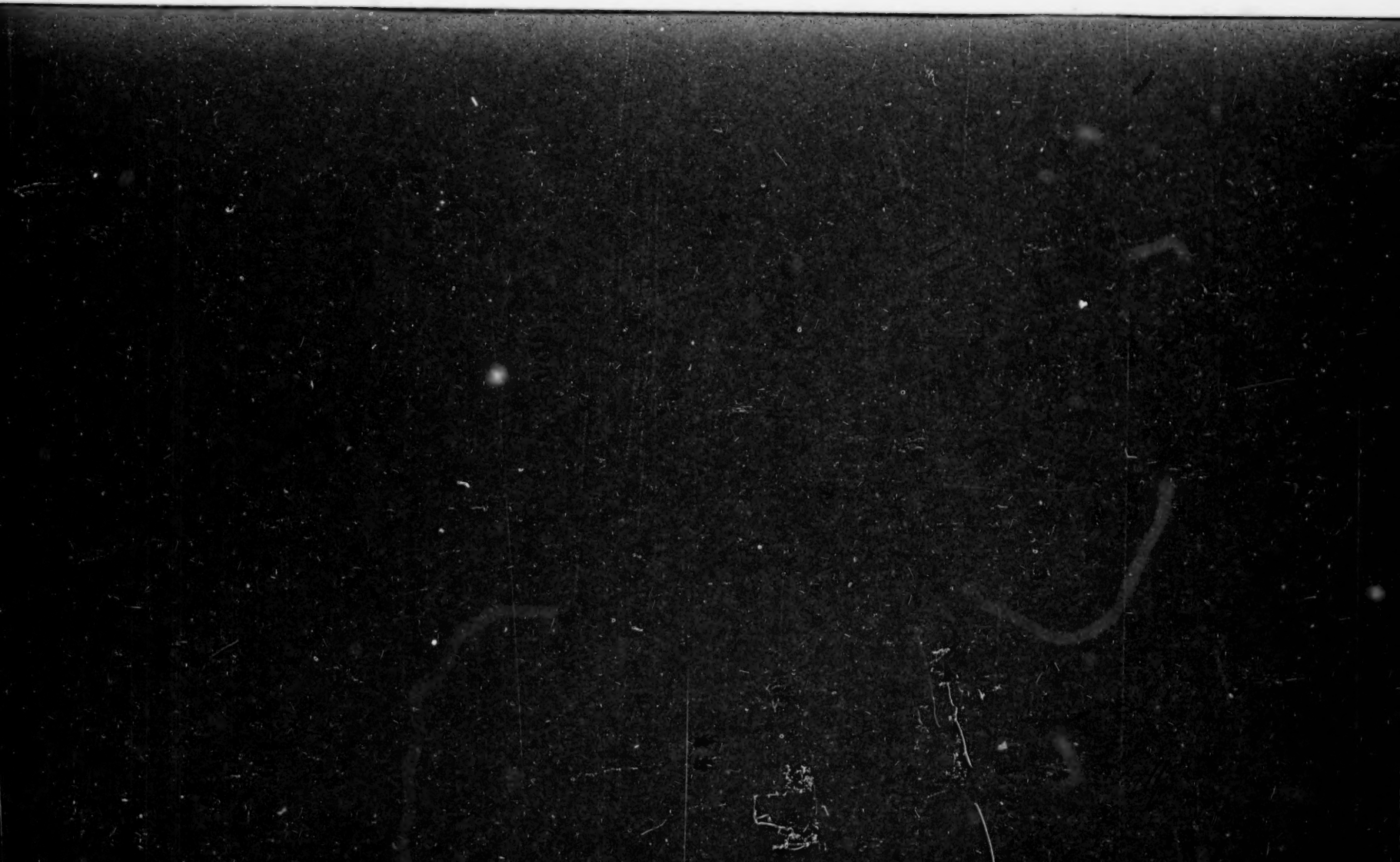

TABLE OF AUTHORITIES

Cases: Page

Alfred A. Knopf, Inc. v. *Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) 5

Freedman v. *Maryland*, 380 U.S. 81 (1965) 4, 6

McGehee v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983) .. 5

Padula v. *Webster*, 822 F.2d 97 (D.C. Cir. 1987) 6

Snepp v. *United States*, 444 U.S. 507 (1980) .....*passim*

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 6

United States v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) 4, 5. 6

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The government's position on the meaning of footnote 8 of this Court's opinion in *Snepp* v. *United States*, 444 U.S. 507, 513 n.8 (1980), is untenable. When that fact is understood, all of the reasons offered by the government for not taking this case fall.

I

The decision below cannot be reconciled with the Court's statement in footnote 8 that the CIA bears "the burden of seeking an injunction against publication" when the Agency and a former employee cannot agree on Agency-suggested deletions. What appears to be the government's attempt at reconciliation (Br. in Opp. 11) turns out to be just words. The government starts out by saying that

footnote 8 "does not say that an injunction entered against an individual who has violated his agreements with the CIA must place the burden of initiating judicial review on the agency." Rather, the government says, the footnote addressed the "hypothetical case that would have arisen" if Snepp had "submitted his manuscript for review and thereafter threatened to publish it."

That sounds like the introduction to an argument that the person who violates a law or breaches a contract cannot complain that he is constrained more stringently by a remedial order than he would be by the law or the contract itself. But that is not the government's argument, and such an argument in this case would be empty because the injunction is as silent on the existence of judicial review—let alone who has the burden of seeking it—as Snepp's secrecy agreement itself. And the injunction was entered to enforce the agreement, 444 U.S. at 509, not to enlarge whatever restrictions it imposed on Snepp.

The Court's statement in footnote 8 that the agreement placed the burden of judicial enforcement on the CIA was part of a response to an assertion in the dissent that the Court was "allowing the CIA to 'censor' its employees' publications." No, said the majority, the secrecy agreement "requires no more than a clearance procedure subject to judicial review." And the review is initiated by the Agency; it bears "the burden of seeking an injunction against publication." The Court did not add, "Of course, the injunction we are affirming establishes quite a different regime of judicial review, one in which Snepp bears the burden of going to court to seek review of any proposed deletion with which he does not agree." The Court did not say that because there was no basis in the injunction, textual or otherwise, for saying it and because the constitutional considerations that led the Court to place upon the Agency the burden of going to court under the secrecy agreement apply equally to an injunction entered to enforce such an agreement.

The government's argument on the meaning of footnote 8 cannot be based on the distinction between agreement and injunction because there is none with respect to the obligations they impose on Snepp. The distinction the government does draw is puzzling and, if we have understood it, insupportable. After the introductory sentences quoted above, the government says that footnote 8 "acknowledges that if an employee seeks to publish without obtaining CIA approval, the agency has the burden of seeking an injunction" (Br. in Opp. 11); but then the government adds that, "if the employee believes that approval has been improperly withheld and wishes to obtain a court order permitting publication, he must seek it." (*Id.*)

That, of course, is not at all what footnote 8 means, for it says nothing about threats to publish without approval or employees seeking court orders. The footnote says that if Snepp had submitted his manuscript for review, if the Agency had found it to contain sensitive material, and if Snepp and the Agency had tried to reach agreement on eliminating harmful disclosures and had not succeeded—"[a]bsent agreement to that effect"—"the Agency would have borne the burden of seeking an injunction against publication." In this case Snepp did submit his manuscript for clearance, the Agency found sensitive material, there was an effort to agree on deletions, the effort failed—and yet it was Snepp who was required to seek judicial review. The Agency did not bear "the burden of seeking an injunction against publication," as the footnote says it should have.

The government also asserts that footnote 8 "cannot fairly be construed to contradict the Court's disposition of the case." (Br. in Opp. 11.) The suggestion is that, because the Court affirmed the injunction, it could not have meant to place on the Agency the burden of seeking judicial review over subsequent disagreements. The suggestion erroneously assumes that the injunction said

something about judicial review inconsistent with the judicial review procedures that the Court said in footnote 8 were properly read into the agreement to keep a "clearance procedure" from constituting unconstitutional censorship. In fact, the injunction says nothing about judicial review.

II

In its argument on the merits, its argument that there has been no such change in law or factual circumstances as to justify a modification of the injunction, and its argument that the question presented does not call for the Court's attention, the government relies heavily on the decision of the court below in *United States* v. *Marchetti*, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). In *Marchetti*, the court, construing a secrecy agreement, said that CIA employees who sign such agreements retain certain rights guaranteed by the First Amendment. Drawing on *Freedman* v. *Maryland*, 380 U.S. 81 (1965), the court said that the CIA must complete its review of a manuscript within 30 days and can withhold approval only for information that is classified. *Marchetti*, 466 F.2d at 1317. The court also said that the employee was entitled to judicial review, but that it found "no reason to impose the burden of obtaining judicial review upon the CIA" and that the burden "ought to be" on the employee. *Id.* As we have seen, that is the opposite of what this Court said in footnote 8 of *Snepp*. The change in the law occurred when this Court made its decision in *Snepp*.

Snepp's injunction contains two provisos incorporating the two rights *Marchetti* had read into the secrecy agreement. What is sought here is a third proviso that accords with this Court's *Snepp* decision on the issue of judicial review. It is no answer to that request to say that the injunction when it was entered was informed by the *Marchetti* decision. Footnote 8 of *Snepp* means that *Marchetti* was mistaken in its allocation of the burden

of seeking judicial review. After *Snepp*, the judicial review terms of secrecy agreements and injunctions entered to enforce them is guided by this Court's decision and not by *Marchetti*, and Snepp's injunction should be amended accordingly.

III

Marchetti cannot stand "as the law of the circuit" (Br. in Opp. 12) after *Snepp*. And it is immaterial, after *Snepp*, that "*Marchetti* . . . rejected" the proposition that "the CIA should bear the burden of initiating judicial proceedings to resolve disputes arising from agreements calling for prepublication review." (*Id.*)

The government's extravagant rhetoric makes *Marchetti* no more material, and the rhetoric is in any event wrong. It is not "petitioner's position . . . that there is no constitutionally significant difference between the arrangements that the CIA has adopted to safeguard classified information and schemes providing for preclearance of movies and other forms of public entertainment." (Br. in Opp. 12) The very significant differences between classified information and forms of public entertainment, which petitioner fully recognizes, are accommodated by the substantial deference that reviewing courts afford to the CIA's censorship decisions. *See, e.g., McGehee* v. *Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1367-70 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975). Those differences do not, however, require that the burden of seeking judicial review be allocated differently because the allocation of that burden does not expose assertedly classified information to disclosure until judicial review is completed. Petitioner does not assert the right to publish willy-nilly, but only after he has given notice of his disagreement and the CIA has had a reasonable period to decide whether to take the matter to court, in which case Snepp could not publish until the conclusion of the litigation.

The government continues to insist in the teeth of footnote 8 that *Marchetti* was correct in placing the burden of seeking judicial review on former CIA employees because of "the sensitivity of the area and confidentiality of the relationship in which information was obtained." 466 F.2d at 1317. However, the Department of Justice, which has more expertise in these matters than the Fourth Circuit, has determined that it will bear the burden of seeking judicial review in the case of former FBI agents, who, as a former Deputy Attorney General observed, "perform counterintelligence duties that involve highly classified matters relating to national security." *Padula* v. *Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (Silberman, J.). It is therefore clear that "the sensitivity of the area and confidentiality of the relationship in which information was obtained" do not require distortion of the constitutional principle established in *Freedman*, 380 U.S. 81, and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), that censors must bear the burden of seeking judicial review when authors dispute their decisions. *Snepp* accords with that principle. *Marchetti* does not. There is no doubt which prevails. This Court should say so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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